No. 75-1664

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN LAWRENCE DUFAULT AND
DENNIS ARNOLD TRONCATTY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1976. A petition for rehearing was denied on April 19, 1976 (Pet. App. 2a). The petition for a writ of certiorari was filed on May 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a prosecution for mailing obscene materials was properly brought in the district in which the material was received.

2. Whether the trial court correctly instructed the jury that expert testimony is not necessary, and that material

depicting homosexual acts may be tested by its prurient appeal to the average person or the average member of the group for which the material was intended.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted on four counts of mailing obscene materials, in violation of 18 U.S.C. 1461. They were each sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed *per curiam* without opinion (Pet. App. 1a).

The government's evidence at trial showed that in 1972 petitioners operated a mail order business under the trade name Dimension in San Francisco, California (App. 210-211).[1] On April 18, 1972, petitioners mailed a brochure (count one) to Rev. E. K. Brink, a minister in Hereford, Texas, the Northern District of Texas, which advertised various homosexually oriented films and magazines (App. 197-199; G.Exs. B-1 to B-4). Rev. Brink had not requested the advertisement and reported the mailing to the local postmaster (App. 200, 204).[2]

At approximately the same time Dennis Alex, a San Francisco postal inspector, received the same brochure from petitioners under a fictitious name and address which he maintained in La Follette, Tennessee. When Alex was advised of the mailing to Rev. Brink, he established a fictitious name and address in Azle, Texas, in

[1]"App." refers to the two-volume appendix filed in the court of appeals. We are lodging a copy of that appendix with the Clerk of this Court. "G.Ex." refers to the government's exhibits which are filed with the Clerk of this Court.

[2]Rev. Brink had previously filed a request to have his name placed on the list maintained by the Postal Service showing that he did not wish to receive sexually oriented materials (App. 194-195).

the Northern District of Texas (App. 263-264, 291). In late May 1972 Alex ordered and received two films that petitioners mailed to the fictitious Texas address (count two) (App. 268, 334; G.Exs. CA-8, CA-10). In December 1972 petitioners mailed a Christmas card advertisement (count three) and in January 1973 a brochure to the Texas address (count four) (App. 271-273; G.Exs. CA-16, CA-22). The films and brochures were forwarded unopened to Alex in San Francisco by the Azle postmistress (App. 268-273).

The brochures, Christmas card, and films explicitly depict homosexual activities, including masturbation and oral and anal intercourse. A government psychiatrist testified that the materials appealed to the prurient interest of homosexuals and of average persons (App. 345-346). In their defense, petitioners called a psychiatrist, a minister, and two psychologists who expressed opinions that the materials did not appeal to the prurient interest of either group (App. 415-416, 453, 473, 538) and that the materials were neither patently offensive (App. 451, 477), nor utterly without redeeming social value (App. 425, 484, 510-511).[3]

1. A venue statute, 18 U.S.C. 3237, permits the prosecution of an offense involving the use of the mails in any district through which the mailed matter moves, and at least since 1958, this statute has been applicable to the mailing of obscene material. See *Reed Enterprises* v. *Clark*, 278 F. Supp. 372 (D. D.C.). Petitioners contend (Pet. 6-15) that the use of the mails was "manufactured"

[3]The mailings occurred prior to this Court's decision in *Miller* v. *California*, 413 U.S. 15, and the jury was therefore instructed under the obscenity standards of *Roth* v. *United States*, 354 U.S. 476, and *Memoirs* v. *Massachusetts*, 383 U.S. 413. The changed standard in *Miller* is of no benefit to petitioners and is therefore inapplicable here. *Hamling* v. *United States*, 418 U.S. 87, 116-117.

by the San Francisico postal inspector when he ordered two films from petitioner under a fictitious name at a postal box in Azle, Texas, and that there was no proper venue or jurisdiction to prosecute them in the Northern District of Texas.[4] We submit that there is no substance to their contention.

On April 18, 1972, before the inspector ordered the films, petitioners had mailed the first brochure involved in this case to Rev. Brink in Hereford, Texas, in the Northern District of Texas (App. 198-199; G.Exs. B-1 to B-4). The brochure was unsolicited and Rev. Brink complained of that mailing to the local postmaster (App. 200, 204). It was on that basis that an investigation commenced in the Northern District of Texas. The fact that Postal Inspector Alex made a test purchase from petitioners in the same district in which the complainant lived and into which the initial brochure was mailed, was not improper. Venue in the Northern District of Texas was not created by the government, but by petitioners' own acts.

Moreover, the record does not indicate that petitioners' use of the mails resulted from governmental activity. During the one year that petitioners were in the mail order business, they sent approximately 100,000 items in the mail, including the three unsolicited mailings which were the basis of three of the four counts in the indictment (App. 256). Their assertion that the single test purchase involved here was the creative force which resulted in the use of the mails is meritless. Petitioners were in the business of mailing. The fact that the government afforded an opportunity to use the mails is of no consequence.[5] See *Price* v. *United States,* 165 U.S. 311, 315. Cf. *Hampton* v. *United States,* No. 74-5822, decided April 27, 1976.

[4]Petitioners did not raise this alleged defect in the institution of the prosecution in their pretrial motions to dismiss the indictment (App. 13-39) and should be barred from asserting this issue by Fed. R. Crim. P. 12(b). See *Davis* v. *United States*, 411 U.S. 233. They did, however, file a motion to transfer the case for trial to the Northern District of California.

2. There were no errors in the court's instructions.

a. The government introduced expert testimony that the materials mailed appealed to the prurient interest of homosexuals and average persons (App. 346). The court charged the jury that expert testimony was not necessary to enable the jury to judge the obscenity of the material introduced into evidence (App. 631-632). Petitioners claim that this instruction was error, arguing that expert testimony is necessary when materials are designed for and disseminated to a "deviant" social group such as male homosexuals, in order to show that to that group, the materials are patently offensive and lack social value.

Petitioners' argument is bottomed on the assertion that the materials were disseminated solely to homosexuals. This assertion finds no support in the record. The materials depicting homosexual acts were introduced into evidence, together with expert testimony on both sides. Homosexuality is not such bizzare deviant behavior that a jury is bound to accept the opinion of any expert in weighing the evidence of obscenity. *Hamling* v. *United States,* 418 U.S. 87, 100.[6] See *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 56, n. 6.

[5]Petitioners' reliance on *United States* v. *Archer*, 486 F. 2d 670 (C.A. 2), is misplaced. There government agents initiated interstate telephone calls which provided the jurisdictional element under the Travel Act, 18 U.S.C. 1952.

[6]For the reason stated, there is no necessity to resolve in this case the question reserved in *Slaton*, *supra*, whether expert testimony is ever required in obscenity cases.

Although *United States* v. *Klaw*, 350 F. 2d 155 (C.A. 2), upon which petitioners rely, would require expert testimony in some circumstances, the Second Circuit in *United States* v. *Wild*, 422 F. 2d 34, 35-36, certiorari denied, 402 U.S. 986, held that the *Klaw* requirement does not apply where, as here, the materials are hardcore pornography.

b. Petitioners challenge the trial court's instructions to the jury (App. 623) to assess the materials in terms of its prurient appeal to the "average person of the community as a whole or of the average member of the homosexual group to which the appeal was made." Petitioners urge that *Mishkin* v. *New York*, 383 U.S. 502, requires that materials dealing with sexual deviancy must be judged exclusively in terms of the relevant deviant group. But in *Mishkin*, this Court merely held that the prurient appeal test is satisfied when appeal is to a deviant group, if assessment in terms of the probable recipient group is permitted. *Mishkin* in no way abandoned the "average person" test. Indeed, an instruction like the instruction given here was approved in *Hamling* v. *United States*, *supra*, 418 U.S. at 128-130.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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